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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 TONY GOODRUM,

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12 Petitioner,

13 v.

14 MATTHEW CATE, Secretary

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16 Respondent.
17 _____

) Civil No. 07cv0752
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18 **ORDER:**

19 **(1) ADOPTING MAGISTRATE**
20 **JUDGE ADLER'S REPORT AND**
21 **RECOMMENDATION and**

22 **(2) DENYING PETITIONER'S**
23 **PETITION FOR WRIT OF HABEAS**
24 **CORPUS.**
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28)

18 Before the Court is Magistrate Judge Jan M. Adler's Report and Recommendation
19 ("R&R") recommending that the Court deny Petitioner Tony Goodrum's ("Petitioner") Petition
20 for Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. § 2254. [Doc. No. 1.]
21 Petitioner timely filed Objections to the R&R. [Doc. Nos. 19, 25.] Respondent has not filed a
22 Reply. For the reasons set forth below, this Court **ADOPTS** the R&R and **DENIES** the Petition
23 in its entirety.
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26 ***Background***

27 The San Diego County District Attorney's Office filed an Information charging Petitioner
28 with one count of murder and personal use of a handgun in violation of California Penal Code §§

1 187(a) and 12022.5(a)(1) and one count of possession of a firearm by a felon in violation of
 2 California Penal Code § 12021(a)(1). [Clerk's Trans. at 1-3.] A jury found Petitioner guilty of
 3 the lesser included offense of voluntary manslaughter (in violation of Cal. Penal Code § 192(a))
 4 and personal use of a handgun, and he was sentenced to 21 years in state prison. [Clerk's Trans.
 5 at 201-203, 276-277.]

6 Petitioner filed a direct appeal challenging his conviction and sentence in the California
 7 Court of Appeal, Fourth Appellate District, Division One. [Lodgment Nos. 3-5.] In an
 8 unpublished opinion, the California Court of Appeal affirmed Petitioner's conviction and
 9 sentence. [Lodgment No. 6.] Petitioner then filed a petition for review in the California
 10 Supreme Court, which was denied without comment. [Lodgment Nos. 7-8.]

11 Petitioner filed a Petition for Writ of Habeas Corpus and a Motion for Discovery
 12 Concerning Law Enforcement Officers in the California Superior Court. These were denied by
 13 written order filed September 29, 2005. [Lodgment Nos. 9-10.] Petitioner then filed a Petition
 14 for Writ of Habeas Corpus in the California Court of Appeal. The California Attorney General
 15 filed a response, and the court denied the petition on April 20, 2006. [Lodgment Nos. 11-13.]
 16 Petitioner then filed another Petition for Writ of Habeas Corpus in the California Superior Court,
 17 which denied the petition. [Lodgment Nos. 14-15.] Petitioner filed a state petition seeking
 18 habeas relief in the California Supreme Court on November 3, 2006. The court denied the
 19 petition without comment on June 13, 2007. [Lodgment Nos. 16-17.] While that petition was
 20 pending, Petitioner filed one more Petition for Writ of Habeas Corpus in the California Superior
 21 Court. The court denied the petition. [Lodgment Nos. 18-19.]

22 Petitioner filed the instant Petition pursuant to 28 U.S.C. § 2254 in this Court on April 23,
 23 2007. [Doc. No. 1.] Respondent filed an Answer on July 16, 2007, and Petitioner filed a
 24 Traverse on July 27, 2007. [Doc. Nos. 9, 12.] In response to the R&R filed on January 14,
 25 2008, Petitioner filed an Objection on January 15, 2008, and the First Amended Objection on
 26 April 21, 2008. [Doc. Nos. 15, 19 and 25.]

27 *Legal Standard*

I. State Prisoner Habeas Corpus Standard

1 A federal court may grant a habeas petition if the applicant is in custody “in violation of
 2 the Constitution or other laws or treaties of the United States.” 28 U.S.C. § 2254(a). State
 3 interpretation of state laws and rules cannot serve as the basis for a federal habeas petition, as no
 4 federal or constitutional questions would be implicated. *Estelle v. McGuire*, 502 U.S. 62, 68
 5 (1991). Habeas petitions are governed by the provisions of the 1996 Antiterrorism and Effective
 6 Death Penalty Act (“AEDPA”). Pursuant to AEDPA, a federal court may grant habeas corpus
 7 relief from a state court judgment only if the adjudication was (1) contrary to, or involved an
 8 unreasonable application of, clearly established federal law, or (2) was based on an unreasonable
 9 determination of the facts in light of the evidence presented in the state court proceedings. 28
 10 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 7-8 (2002).

11 A state-court decision is “contrary to clearly established federal law” if it (1) applies a
 12 rule that contradicts the governing law set forth in Supreme Court cases, or (2) confronts a set of
 13 facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless
 14 arrives at the opposite result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state-court
 15 decision is an unreasonable application of the facts “if the state court identifies the correct
 16 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
 17 principle to the facts of the prisoner’s case.” *Id.* at 413.

18 **II. Reviewing a Magistrate Judge’s R&R**

19 The duties of the district court in connection with a magistrate judge’s R&R are set forth
 20 in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1) (2005). The
 21 district court must “make a *de novo* determination of those portions of the report . . . to which
 22 objection is made,” and “may accept, reject, or modify, in whole or in part, the findings or
 23 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1) (2005); *see also United*
 24 *States v. Raddatz*, 447 U.S. 667, 676 (1980). “When no objections are filed, the district court
 25 may assume the correctness of the magistrate judge’s findings of fact and decide the motion on
 26 the applicable law.” *Johnson v. Nelson*, 142 F. Supp. 2d 1215, 1217 (S.D. Cal. 2001). “Under
 27 such circumstances, the Ninth Circuit has held that ‘a failure to file objections only relieves the
 28 trial court of its burden to give *de novo* review to factual findings; conclusions of law must still
 be reviewed *de novo*.’” *Id.* (quoting *Barilla v. Ervin*, 886 F.2d 1514, 1518 (9th Cir. 1989)). In

1 this case, Petitioner filed objections to the R&R. [Docs. Nos. 19 and 25.] Accordingly, this
 2 Court will make *de novo* determinations of factual findings as to those portions of the R&R to
 3 which objections have been made.

4 5 *Petitioner's Objections*

6 Because Petitioner has filed objections to the R&R, the Court must conduct a *de novo*
 7 review of the portions of the R&R to which objections were made. Here, Petitioner objects to:
 8 (1) the trial judge's refusal to allow a jury instruction based on CALJIC No. 5.42 and Penal
 9 Code section 198.5 and (2) the R&R's conclusion that there was insufficient evidence of an
 10 unlawful or forcible entry to justify such an instruction.

11 12 *Discussion*

13 Petitioner challenges his confinement on the basis that: (1) the trial court improperly
 14 refused to instruct the jury that a defendant is presumed to have a reasonable fear of imminent
 15 death or great bodily injury in defending himself or others against another person who
 16 unlawfully or forcibly enters the defendant's home and (2) the trial court abused its discretion by
 17 improperly admitting evidence of a prior armed robbery conviction. [Doc. No.1.] Petitioner
 18 first raised these claims on direct appeal before the California Court of Appeal, which affirmed
 19 the judgment of the state trial court in an unpublished written opinion. [Lodgment No. 6.] The
 20 California Supreme Court denied review without citation of authority. [Lodgment No. 8.]
 21 Where there is no reasoned state decision from the state's highest court, a federal court must
 22 "look through" to the underlying appellate decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-806
 23 (1991). Thus, this Court must use the decision of the California Court of Appeal as the basis for
 24 its analysis.

25 **A. The Trial Court's Refusal to Give Jury Instructions on Previous Threats and "Use** 26 **of Force Within Residence"**

27 Petitioner contends that the trial court erred in refusing to instruct the jury both that the
 28 antecedent threats justified quicker measures in self-defense and that a defendant is presumed to
 have a reasonable fear of imminent death or great bodily injury in defending himself or others

1 against another person who unlawfully or forcibly enters the defendant's home. [Doc. No.1 at
2 6.] Petitioner further argues that both were part of his defense theory of self-defense and that the
3 trial court's refusal to instruct amounted to prejudicial error. Despite Petitioner's objection that
4 there was sufficient evidence to justify the above jury instructions, the evidence suggests that the
5 magistrate's finding that the trial court did not commit an error by refusing to instruct the jury on
6 the above claims was correct. A jury is entitled to instruction relating to a theory of defense for
7 which there is any foundation in the evidence, even though the evidence may be weak,
8 insufficient, inconsistent, or of doubtful credibility." *United States v. Lemon*, 824 F. 2d 763, 764
9 (9th Cir. 1987.) "A 'mere scintilla' of evidence supporting a defendant's theory, however, is not
10 sufficient to warrant a defense instruction." *United States v. Morton*, 999 F.2d 435, 437 (9th Cir.
11 1993.) To set aside a conviction based on improper omission of a jury instruction, the Court
12 must find that the jury instruction was not only improperly omitted, but that the omission "so
13 infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*,
14 414 U.S. 141, 147 (1973) (citing *Estelle, supra*, 502 U.S. at 72). In other words, denial of
15 proposed theory of defense instruction is not error if other jury instructions adequately address
16 the theory of defense. *U.S. v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990).

17 The California Court of Appeals denied Petitioner's claim that the trial court was
18 erroneous in refusing to instruct the jury that the victim's antecedent threats justified quicker
19 measures in self-defense because the court found that the acts and statements made by the
20 decedent did not occur on a prior occasion but were instead part of the series of acts and
21 statements that led up to the shooting." (Lodgment No. 6 at 8.) This finding is not the result of
22 an unreasonable application of United States Supreme Court law. The instructions given by the
23 state court at the conclusion of the trial adequately addressed Petitioner's self-defense theory by
24 including the terms and phrases "imminent danger," "necessary under the circumstances,"
25 "avoiding his own death or great bodily injury," and "well-founded belief that it is necessary to
26 save one-self from death or great bodily harm." (Rep. Trans. 831-833.) These instructions
27 allowed the jury to fully consider the threats made by decedent Stamps against Petitioner even
28 though the court did not give the particular instruction regarding the antecedent threats.

1 Even if the trial judge erred by not specifically instructing the jury as to antecedent threat,
 2 the failure to give the instruction did not “infect the entire trial, rendering it fundamentally
 3 unfair.” *Estelle v. McGuire*, *supra*, 502 U.S. at 72. As stated above, the instructions that were
 4 given by the court invited the jury to consider the threats and actions by the decedent whether or
 5 not they were technically “antecedent.” Thus, the omission of the particular instruction solely
 6 addressing antecedent threats, whether proper or not, does not rise to the level of a constitutional
 7 violation that would entitle Petitioner to habeas relief.

8 In denying Petitioner’s claim with regards to the “Use of Force Within Residence”
 9 instruction, the appellate court noted that for the presumption of self-defense to apply, there must
 10 be an unlawful and forcible entry into the residence. [Lodgment No. 6 at 9-10.] Under
 11 California law, a person is guilty of a forcible entry if he breaks open “doors, windows, or other
 12 parts of a house, or by any kind of violence or circumstances of terror enters” into real property.”
 13 West’s Ann. Cal.C.C.P. § 159. Petitioner himself testified that when the victim “banged” on the
 14 garage door, he opened the door and victim entered. [Rec. Trans. 449-451.] Thus, there is no
 15 evidence that the victim broke into the house or entered the premises in a violent manner or by
 16 terrorizing the occupants. Accordingly, the evidence that was available amply supported the
 17 trial court’s refusal to give the “Use of Force Within Residence” instruction.

18 **B. The Trial Court’s Admission of Evidence of Petitioner’s Prior Conviction**

19 Petitioner argues that the trial court’s admission of evidence regarding his 1981 attempted
 20 armed robbery conviction violated his right to due process and deprived him of a fair trial. [See
 21 Doc. No. 1.] Petitioner contends that the only possible inference that the jury could have drawn
 22 from the evidence of the prior conviction was that Petitioner’s guilt with regards to prior crimes
 23 renders him guilty of the crimes alleged at trial. (*Id.*)

24 California Evidence Code section 1103, subdivision (b), (“section 1103”), allows
 25 introduction of evidence of a defendant’s violent acts and reputation for violence if a defendant

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1 presents evidence as to the bad acts or reputation for violence of the victim of a crime. *People v.*
2 *Koontz*, 27 Cal. 4th 1041, 1083 (2002). The court may exercise its discretion to exclude such
3 evidence if its probative value is outweighed by a danger of undue prejudice. Evid. Code § 352.
4 Among the factors tending to undercut a finding that a defendant's prior violent conviction is
5 probative is that the conviction occurred in the remote past and the defendant subsequently led a
6 blameless life. *See People v. Green*, 34 Cal. App. 4th 165, 182-183 (1995). The trial court will
7 have abused its discretion only if its judgment exceeds the bounds of reason, considering all the
8 circumstances. *Id.*

9 Petitioner argues that even though section 1103 authorized the admission of his prior
10 conviction, the court should have exercised its discretion to exclude the conviction because it
11 occurred in too remote a time. [Doc. No. 1 at 32.] However, the 22 year old conviction was not
12 so remote in time as to have no probative value primarily because it also involved the use of a
13 gun, an issue of significant importance in this case. Additionally, Petitioner is only entitled to
14 habeas relief on this claim if he can show that the state court's reasoning "resulted in a decision
15 that was contrary to, or involved an unreasonable application of, clearly established federal law,
16 as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). There is no
17 clearly established federal law on the issue of whether a state law would violate the Due Process
18 clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged
19 crime." *Alberni v. McDaniel*, 458 F.3d 860, 864 (9th Cir. 2006), citing *Estelle*, 502 U.S. at 75.
20 Additionally, even if the trial court erred in admitting evidence of the prior conviction, no
21 prejudice resulted to Petitioner because examination of the prior conviction was "very brief," it
22 was not mentioned during closing argument, and the record contains ample evidence to support
23 the jury's conviction of manslaughter. (Lodgment 6 at 10-13.) Because of these facts, Petitioner

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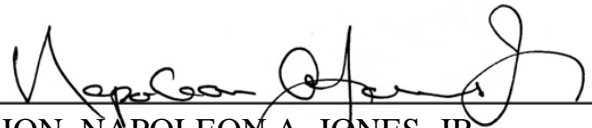
1 cannot establish that admitting the fact of his prior conviction resulted in a trial that was
2 “fundamentally unfair,” and that he is entitled to habeas relief. *McKinney v. Rees*, 993 F.2d
3 1378, 1384-1386 (9th Cir. 1993), citing *Dowling v. United States*, 493 U.S. 342 (1990).

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5 ***Conclusion***

6 After a thorough review of the record, the Court **FINDS** that Petitioner has not shown that
7 he is entitled to federal habeas relief under the applicable legal standards. Accordingly, the
8 Petition is **DENIED**.

9 **IT IS SO ORDERED.**

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11 DATED: September 6, 2008

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13 HON. NAPOLEON A. JONES, JR.
14 United States District Judge
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